

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CARMEN RIOS)	
Claimant)	
VS.)	
)	
NATIONAL BEEF PACKING COMPANY)	Docket Nos. 175,891;
Respondent)	186,485; & 189,187
AND)	
)	
LUMBERMEN'S UNDERWRITING ALLIANCE)	
WAUSAU INSURANCE COMPANIES)	
Insurance Carriers)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

The respondent and claimant appeal from the Award by Administrative Law Judge Jon L. Frobish dated July 19, 1996. The Appeals Board heard oral argument January 14, 1997.

APPEARANCES

Claimant appeared by her attorney, Lawrence M. Gurney of Wichita, Kansas. Respondent and its insurance carriers appeared by their attorney, Shirla R. McQueen of Liberal, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Wendel W. Wurst of Garden City, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award. The Appeals Board has also adopted the stipulations listed in the Award.

ISSUES

Docket No. 175,891

Docket No. 175,891 involves a claim for bilateral upper extremity injuries from September 1991 and each day worked thereafter. The Administrative Law Judge awarded benefits for a 6 percent general body disability. On appeal the parties raise issues relating to nature and extent of disability, credit under K.S.A. 44-510a (Ensley) and Fund liability. Specifically, respondent contends the award should be limited to benefits for injury to the right upper extremity. Claimant, on the other hand, argues she is entitled to benefits for a work disability. The Administrative Law Judge denied respondent's request for K.S.A. 44-510a (Ensley) credit and Fund liability. Respondent contends that the relationship between the current (1991) injury and a 1990 injury to claimant's left upper extremity entitles respondent to credit for amounts paid in settlement of the 1990 injury and entitles respondent to shift liability to the Kansas Workers Compensation Fund.

Docket No. 189,187

Docket No. 189,187 involves a back injury on May 7, 1993. The Administrative Law Judge transposed docket numbers and as a result awarded benefits for this claim (No. 189,187) under No. 186,485. For the May 7, 1993, back injury the Administrative Law Judge awarded benefits for a 32 percent work disability. The issues raised on appeal again involve nature and extent, credit under K.S.A. 44-510a (Ensley) and Fund liability. Respondent argues the award should be based on functional impairment only. In the alternative, if claimant receives benefits for a work disability, respondent asks for K.S.A. 44-510a (Ensley) credit and Fund liability.

Docket No. 186,485

Docket No. 186,485 involves an injury to claimant's right hand and wrist in December of 1993. As indicated, the Administrative Law Judge transposed this docket number (186,485) with Docket No. 189,187, the docket number for the back injury. The Administrative Law Judge found the December 1993 injury to be temporary only and awarded no benefits for permanent injury. At the time of oral argument, none of the parties disputed this finding.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments made by the parties the Appeals Board finds and concludes as follows:

Docket No. 175,891

In Docket No. 175,891, the claim for bilateral upper extremity injuries, the parties have stipulated to December 19, 1991, as the date of accident. The Appeals Board finds claimant is entitled to benefits based on a 6 percent permanent partial disability from December 19, 1991, to March 27, 1994, and a 40 percent work disability thereafter. The Appeals Board also concludes respondent is not entitled to credit under K.S.A. 44-510a and is not entitled to shift liability to the Kansas Workers Compensation Fund.

Claimant began working for respondent in August 1989 and suffered accidental injury to her left upper extremity on March 29, 1990. This injury, treated in a separately-docketed claim, 150,665, was settled by agreement at a settlement hearing held on March 27, 1991. Claimant was paid for a 20 percent permanent partial impairment of function to her left upper extremity. She was also paid for 21 weeks of temporary total disability and certain medical benefits. Claimant was off of work on several occasions and finally returned to work on a regular basis on December 21, 1990.

In less than a year after her return to work, claimant began to experience bilateral upper extremity symptoms. The symptoms developed during the period September 7, 1991, through December 19, 1991, and are the subject of this Docket No. 175,891. In spite of those injuries, claimant continued to work. She did not take leave until November 11, 1992. At that time, respondent could no longer accommodate the restrictions from claimant's bilateral upper extremity injuries. Claimant returned to work on December 17, 1992, in a position cleaning up the locker room. This was a regular job but one offered to claimant to accommodate her restrictions. She continued to work in this accommodated position until she suffered a low-back injury on May 7, 1993.

After the low-back injury of May 7, 1993, claimant was off from June 28, 1993, to September 2, 1993. She then returned and worked until she suffered additional symptoms in her right upper extremity in December 1993. The problems in her right upper extremity are the subject of Docket No. 186,485. For the problems with her right upper extremity, claimant was taken off work from January 10, 1994, to January 27, 1994. Claimant returned and continued to work until March 27, 1994.

On March 27, 1994, claimant was taken off work because of a set of temporary restrictions imposed for her back injury. While off work, claimant was referred for medical evaluation of both the bilateral upper extremity and her low-back injuries. She was evaluated by Dr. C. Reiff Brown and Dr. Phillip Mills. Based upon the opinions from those

physicians, respondent concluded it could not accommodate claimant's restrictions. Claimant was placed on a leave of absence and, after two years, was terminated in accordance with the union contract.

Respondent first argues that the award for the bilateral upper extremity should be limited to an award for the right upper extremity. Respondent asserts that only the right upper extremity was a new injury, that the left was covered in the 1990 injury, Docket No. 150,665. The evidence establishes, however, that claimant suffered additional injury on the left following the 1990 injury. Both of the two rating doctors, Dr. Phillip Mills and Dr. C. Reiff Brown, give testimony which suggest that their ratings are for a disability in addition to any disability which was part of the settlement for the 1990 injury. Dr. Mills expressly states he is finding impairment in the left which is in addition to the 1990 impairment. Dr. Brown attributes his ratings to the 1991 injuries after reviewing the records of the treatment for the 1990 injury.

Dr. Brown rated claimant's injury as a 5 percent permanent partial impairment of function of each upper extremity and converted that rating to a 6 percent general body impairment. Dr. Mills, on the other hand, rated claimant's impairment as 10 percent to each upper extremity. It appeared from his report of October 27, 1994, that he would convert these ratings to an 11 percent permanent partial impairment to the body as a whole. The Administrative Law Judge adopted the rating by Dr. Brown. The Appeals Board considers the 6 percent to be reasonable and finds claimant suffered a 6 percent functional impairment to the body as a whole for the impairment suffered during the period September 1991 through December 1991.

Claimant argued she is entitled to benefits for functional impairment to the date of layoff and work disability thereafter. Respondent and Fund, on the other hand, point out claimant returned to work at a comparable wage after the bilateral upper extremity injuries and argued the award should be limited to functional impairment based on the presumption of no work disability found in K.S.A. 44-510e.

As previously indicated, the record establishes that claimant was initially put on a leave of absence in March 1994 because of restrictions for the low-back injury which the respondent did not consider to be permanent. While off work claimant received additional ratings and evaluations. Those ratings by Dr. Mills and Dr. Brown included restrictions for the bilateral upper extremities. Respondent's director of nursing and director of workers compensation, Ms. Janet Killgore, testified that respondent could have accommodated the final restrictions for claimant's low-back injury but could not return claimant to work because of the bilateral upper extremity restrictions. Respondent could, and did in fact, accommodate restrictions on claimant's left upper extremity following the 1990 injury. Respondent could not accommodate the restrictions once they became bilateral.

The Appeals Board therefore finds that effective March 28, 1994, claimant's disability should be increased to a work disability based upon the restrictions for the bilateral upper extremity injuries. The circumstances are analogous to those in Lee v. Boeing Co., 21 Kan. App. 2d 365, 899 P.2d 516 (1995). Before the layoff, claimant earned a comparable wage. After the layoff, claimant no longer earned a comparable wage. The presumption of no work disability no longer applies and claimant is eligible for work disability.

The injury involved in this claim occurred at a time when work disability was defined in terms of loss of ability to earn a comparable wage and the loss of ability to obtain employment in the open labor market. K.S.A. 1991 Supp. 44-510e. Mr. Jerry Hardin and Ms. Karen Terrill gave opinions on both the wage and labor market components. Both experts gave separate opinions based upon the restrictions of Dr. C. Reiff Brown and the restrictions of Dr. Phillip Mills. Both also gave opinions which accounted for restrictions imposed by Dr. Melhorn for the 1990 left forearm injury. These opinions express the labor market loss attributable to the 1991 injuries only by first defining the accessible labor market with the prior restrictions. The additional restrictions in 1991 were then applied to the new labor market. By this method, Mr. Hardin concluded claimant's labor market loss was 45-50 percent based on Dr. Mills' restrictions and 50-55 percent based on Dr. Browns'. Ms. Terrill applied restrictions of Dr. Palmer and, using the same method, determined claimant had lost 36 percent of her labor market. By treating Mr. Hardin's opinion as 50 percent, an average of opinions based on the two physicians restrictions, and then giving Mr. Hardin's opinion equal weight with the opinion of Ms. Terrill, (36 percent) the Appeals Board finds claimant has a 43 percent loss of access to the labor market attributable to the bilateral upper extremity injuries in 1991.

Mr. Hardin and Ms. Terrill also expressed opinions regarding the impact of the injury on claimant's loss of ability to earn a comparable wage. Mr. Hardin expresses his opinion that claimant would be able to earn \$190-200 per week. Ms. Terrill, on the other hand, testifies claimant should be able to earn \$220-240 per week. At the time of the injury, claimant's average weekly wage was \$333.83. Mr. Hardin's projected post-injury wage, using the mid-point of \$195, would be 42 percent less than the \$333.83 average weekly wage. Although Ms. Terrill gives a different percentage because she compares hourly wage, her projected wage, using \$230 as the projected wage, would be 31 percent less than the \$333.83 average weekly wage. Again giving equal weight to the two expert opinions, the Appeals Board finds that claimant sustained a 36.5 percent loss of ability to earn a comparable wage. By giving equal access to the wage loss and labor market loss components, the Appeals Board concludes that claimant sustained a 40 percent work disability attributable to the 1991 injury. Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990). The permanent disability award should increase to the 40 percent work disability on March 28, 1994.

Respondent has requested a K.S.A. 44-510a credit for the 1990 injury. The Appeals Board does not, however, consider a credit appropriate. The K.S.A. 44-510a credit avoids pyramiding of benefits by offsetting benefits paid for one injury when it contributes to the disability from a second injury. The credit is given during the period that the benefits overlap. In this case claimant's first injury occurred on March 30, 1990. She was paid 21 weeks of temporary total disability and the claim was settled on the basis of 20 percent impairment to the left forearm. This would have entitled claimant to benefits for 35.8 weeks in addition to the 21 weeks of temporary total disability. Benefits would therefore have been paid for 56.8 weeks from the date of injury. The second injury, the injury of 1991 at issue in this case, occurred more than 56.8 weeks after the first. There would, therefore, be no period of overlap for credit under K.S.A. 44-510a.

The Appeals Board also finds that respondent is not entitled to shift any portion of liability for this 1991 injury to the Kansas Workers Compensation Fund. The Kansas Workers Compensation Fund is liable under certain circumstances for injuries which occur to handicapped employees. The Fund may be liable for all of the benefits if the second injury would not have occurred but for the preexisting handicap. The Fund may be liable for a portion of the preexisting impairment if it contributes to the ultimate disability of the second injury. K.S.A. 44-567. The record in this case does not include any medical opinion that the 1991 injury would not have occurred but for the preexisting impairment. The record also does not include any basis for determining the extent, if any, to which the 1990 injury contributed to the 1991 injury. The work disability calculated for the 1991 injury is based on the new disability caused by the 1991 injury only. The 1990 injury, therefore, did not contribute to the overall disability from the 1991 injury. For these reasons, the Appeals Board concludes that the Workers Compensation Fund should not be liable for any portion of the award in Docket No. 175,891.

In summary, for the 1991 bilateral upper extremity injuries (Docket No. 175,891) the Board finds claimant sustained a 6 percent permanent partial disability to the body as a whole which became a 40 percent work disability on March 28, 1994, when claimant no longer earned a comparable wage. Respondent is not entitled to a K.S.A. 44-510a credit and the respondent is liable for 100 percent of the benefits.

Docket No. 189,187

For Docket No. 189,187, the claim for claimant's low-back injury of May 7, 1993, the Appeals Board concludes claimant is entitled to benefits based upon a 7 percent impairment of function to the body as a whole.

Claimant argued that she should be entitled to a second work disability for this low-back injury. However, the evidence does not establish a work disability greater than the functional impairment. Mr. Hardin and Ms. Terrill again both gave opinions on this issue. Mr. Hardin testified that claimant would have a 20-25 percent loss of access to the labor

market if you first redefine the labor market on the basis of the restrictions which existed prior to this injury. Using the same methodology, and applying Dr. Brown's restrictions, results in no loss of access to the labor market. Ms. Terrill concludes that there would be a 7 percent loss of access to the labor market based upon Dr. Mills' and Dr. Blaty's low-back restrictions. Based upon Dr. Villanueva's restrictions there would, again, be a zero percent loss of access to the labor market. The Appeals Board concludes that the increased loss of access to the labor market would be less than 10 percent, based upon the various opinions. The record also suggests there would be no additional loss of ability to earn a wage attributable to the back injury. Giving equal weight to the labor market loss and the wage loss yields a work disability less than the 7 percent functional impairment. The Appeals Board, therefore, awards benefits for a 7 percent permanent partial disability to the body as a whole. K.S.A. 44-510e.

The Appeals Board again concludes that respondent is not entitled to either credit or Fund liability in this claim. The back injury was not contributed to or caused by a preexisting disability. The preexisting disability did not contribute in any way to the overall disability awarded for the back injury. Neither credit nor Fund liability can be awarded.

Docket No. 186,485

Docket No. 186,485 relates to the claim for injuries which occurred in December of 1993 to claimant's right hand, arm, and shoulder. The Administrative Law Judge found that this injury was temporary only and resulted in no additional permanent disability. This finding is supported by records of the treating physician, Dr. Harrington. Although Dr. Brown does provide a rating for this injury, he also testified that he found no evidence of any new permanent injury. He provided a rating only on the basis of potential for further injury. On appeal, none of the parties disputed the finding on this claim. The Appeals Board therefore agrees with and modifies the finding by the Administrative Law Judge that the injury of December 1993 was temporary only and resulted in no additional permanent disability.

AWARD

Docket No. 175,891

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated July 19, 1996, should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Carmen Rios, and against the respondent, National Beef Packing Company, and its insurance carrier, Lumbermen's Underwriting Alliance, for an accidental injury which occurred December 19,

1991, and based upon an average weekly wage of \$333.83 for 52.29 weeks of temporary total disability compensation at the rate of \$222.56 per week or \$11,637.66, followed by 66.14 weeks at the rate of \$13.35 per week or \$882.97, for a 6% permanent partial disability, through March 27, 1994, followed by 296.57 weeks at \$89.02 per week for a 40% work disability or \$26,400.66, beginning March 28, 1994, for a total award of \$38,921.29.

As of February 28, 1997, there is due and owing claimant 52.29 weeks of temporary total disability compensation at the rate of \$222.56 per week or \$11,637.66, followed by 66.14 weeks of permanent partial compensation at the rate of \$13.35 per week in the sum of \$882.97, and 152.71 weeks at the rate of \$89.02 per week or \$13,594.24, for a total of \$26,114.87, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$12,806.42 is to be paid for 143.86 weeks at the rate of \$89.02 per week, until fully paid or further order of the Director.

Docket No. 189,187

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated July 19, 1996, should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Carmen Rios, and against the respondent, National Beef Packing Company, and its insurance carrier, Lumbermen's Underwriting Alliance, for an accidental injury which occurred May 7, 1993, and based on an average weekly wage of \$330.64 for a 7% general body disability. Claimant is entitled to one week of temporary total disability or \$220.44 followed by 414 weeks at \$15.43 per week or \$6,388.02 for a total award of \$6,608.46.

As of February 28, 1997, there would be due and owing one week of temporary total disability or \$220.44 and 198 weeks of permanent partial disability at \$15.43 per week or \$3,055.14 for a total due and owing of \$3,275.58 which is ordered paid in one lump sum less amounts previously paid. Thereafter the balance of \$3,332.88 shall be paid at \$15.43 per week for 216 weeks, until fully paid or further order of the Director.

Docket No. 186,485

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated July 19, 1996, should be, and is hereby, affirmed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Carmen Rios, and against the respondent, National Beef Packing Company, and its insurance carrier, Wausau Insurance Companies, for an accidental injury sustained on December 31, 1993. The claimant is entitled to 3.43 weeks temporary total disability at the rate of \$226.88 per week or \$778.20 which is ordered paid in one lump sum less any amounts previously paid.

The Appeals Board approves and adopts the orders of the Administrative Law Judge relating to fees and expenses.

IT IS SO ORDERED.

Dated this ____ day of February 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Lawrence M. Gurney, Wichita, KS
Shirla R. McQueen, Liberal, KS
Wendel W. Wurst, Garden City, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director